September 24. 1768.

ANSWERS

FOR

ROBERT ARTHUR, merchant in Irvine,

TO THE

PETITION of Meſſrs. Haſtie and Jamieſon merchants in Glaſgow.

THE reſpondent, Robert Arthur, being creditor to James Dunlop merchant in Glaſgow, in the ſum of L. 2632 : 6 : 6 Sterling, brought an action in this court againſt him for payment.

Upon this depending action he uſed arreſtments in the hands of ſundry perſons, debtors to the ſaid James Dunlop; and, among others, in the hands of Meſſrs. Archibald, Dunlop and Ralſton, merchants in Virginia.

The reſpondent afterwards, in July 1764, obtained decreet againſt the ſaid James Dunlop, for payment of the ſum above mentioned; and having thereafter brought a proceſs of forthcoming in this court againſt Dunlop and Ralſton, upon the arreſtments uſed in their hands, he, on the 1ſt January 1766, obtained decreet againſt them.

The reſpondent having received intelligence, that a veſſel, called *The Betſy*, David Conkie maſter, with a cargo of conſiderable value, the property of Archibald Dunlop, was, in ſummer 1765, upon her voyage from Virginia to Clyde,

he reſolved to attach them the moment of their arrival; and having for that purpoſe obtained letters of arreſtment, together with the concurrence of the judge-admiral, he did accordingly, of this date, arreſt both the veſſel and cargo in the hands of Conkie the maſter, immediately upon their arrival in the river, and before they had been reported at the cuſtom-houſe.

Aug. 26, 1765.

After the date of the reſpondent's arreſtments, the ſhip and cargo were alſo arreſted by Meſſrs. Harries, Cochran and Company, merchants in London, as likewiſe creditors to Archibald Dunlop.

The veſſel and cargo were conſigned by Archibald Dunlop to Meſſrs. Haſtie and Jamieſon merchants in Glaſgow; and in order to prevent the cargo from ſuffering, by being locked up in the poſſeſſion of the arreſtee, till the diſpute between the arreſters and the conſignees ſhould be determined at law, the arreſtments were looſed upon caution in the uſual form, and the petitioners, the conſignees, who managed Archibald Dunlop's affairs in this country, became cautioners for David Conkie the arreſtee.

After the petitioners had in this manner got poſſeſſion of the ſhip and cargo, arreſtments were uſed in their hands, both by the reſpondent and Meſſrs. Harries, Cochran and company. Thereafter a proceſs of multiple-poinding was raiſed both by the petitioners and by Conkie the ſhipmaſter; and Meſſrs. Harries, Cochran and Company, having brought a proceſs of forthcoming, which was remitted to the multiple-poinding depending before Lord Pitfour, a competition enſued between the reſpondent, the firſt arreſter, and the petitioners Meſſrs. Haſtie and Jamieſon, the conſignees.

The petitioners alledged, That the proceeds of both ſhip and cargo were entirely exhauſted by debts due to them by Archibald Dunlop, and by an account which they produced, attempted to ſhow, that even after that, there would ſtill remain a conſiderable balance due to them.

Upon examining this account, many and various good objections occurred to it; but at the ſame time, the reſpondent did by no means apprehend it to be incumbent upon him,

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him, to enter into any diſpute with the petitioners concerning that account, as he conceived, that, in conſequence of his arreſtments of the veſſel and cargo, long before they came into their poſſeſſion, he had a clear and undiſputed right to them, altogether excluſive of any claim competent to the petitioners, the conſignees.

It was therefore inſiſted, that, without entering into any examination of the account, they ſhould proceed to fix and aſcertain what was in the poſſeſſion of Conkie, at the time of the arreſtments uſed in his hands; and that therefore he ſhould be obliged to depone in the forthcoming, and to produce his bill of loading, invoice, inſtructions, and other papers, from whence it might appear, what was the extent of this cargo, and to whom the property of it belonged.

After repeated appointments of the Lord Ordinary, and after various delays of the petitioners, Conkie was at length brought to depone, and by his oath clearly inſtructed, that the ſhip and cargo were the property of Archibald Dunlop, at the time of the reſpondent's arreſtment. His words are, 'That, on the 26th Auguſt 1765, the date of 'each of the two executions of arreſtment produced at the 'inſtance of the before-mentioned Robert Arthur, uſed in 'the hands of the deponent, and upon the ſhip, the depo-'nent had both the ſhip Betſy, and her cargo, mentioned in 'the ſaid bill of loading, in his the deponent's poſſeſſion, 'and under his command. Depones, That the ſaid two 'arreſtments were uſed and laid on before the ſaid ſhip and 'cargo were reported, and entered at the cuſtom-houſe; and 'the ſhip with her cargo then lay at the harbour of Port-'Glaſgow; that is, at the uſing ſaid arreſtments. Depones, 'That the ſaid ſhip, and cargo on board the ſame, as men-'tioned in the ſaid bill of loading, *were the property of the ſaid* '*Archibald Dunlop* merchant in Virginia, and were by him 'conſigned to Meſſrs. Haſtie and Jamieſon; and that, *ſubſequent* 'to laying on the foreſaid arreſtments, the deponent delivered 'over the ſaid ſhip and cargo to the ſaid Meſſrs. Haſtie and 'Jamieſon, upon their becoming caution in the looſing the 'ſaid arreſtments."

After

After this preliminary had been fixed, parties were fully heard by the Lord Ordinary. The reſpondent inſiſted upon his preferable right to the veſſel and cargo, in virtue of his arreſtment of the ſhip, and that in the hands of Conkie the ſhipmaſter. The petitioners inſiſted to be preferred, becauſe the veſſel and cargo had been conſigned to them by the common debtor.

Feb. 17. 1768. Upon adviſing full memorials, the Lord Ordinary, of this date, pronounced the following interlocutor: 'Having adviſed this memorial, with the memorial for Meſſrs. Haſtie and Jamieſon, and conſidered the letters from Archibald Dunlop to Meſſrs. Haſtie and Jamieſon, and other writs produced, finds, that there appears no ſufficient evidence that the ſaid Archibald Dunlop was diveſted of the property of the ſhip or cargo in favours of Haſtie and Jamieſon; and conſequently, that the ſame was liable to be affected by the diligence of his creditors, and prefers Robert Arthur upon his arreſtment, and decerns in the preference, and againſt the raiſers of the multiple-poinding, for payment accordingly.'

Againſt this interlocutor two conſecutive repreſentations were offered by the petitioners; but the Lord Ordinary adhered by interlocutors of 2d and 19th July 1768.

Againſt theſe interlocutors of the Lord Ordinary, they have preſented a reclaiming petition, to which, in obedience to your Lordſhips appointment, the following anſwers are humbly offered.

As the reſpondent was unqueſtionably intitled to attach, by legal diligence, the property of his debtor wherever he found it; ſo, he apprehends, the ſimple queſtion in the preſent caſe is, Whether, when he arreſted the veſſel and cargo in queſtion, they were the property of Archibald Dunlop? It is admitted by the petitioners, that originally both the veſſel and cargo were the abſolute property of Archibald Dunlop; and, it is apprehended therefore, that they muſt be preſumed to have continued his property, and conſequently affectable by his creditors; unleſs the petitioners ſhall clearly inſtruct, that, before the date of the reſpondent's arreſtment,

reſtment, they were transferred to them in a proper and legal manner.

In theſe anſwers the reſpondent ſhall, in the *firſt* place, very ſhortly explain to your Lordſhips, a little of the nature of that trade which Archibald Dunlop is now, and for a number of years paſt has been carrying on in Virginia, and ſhall endeavour to ſhew, that, according to the natural courſe of buſineſs in that trade, this veſſel and cargo ought to be applied towards extinguiſhing the debt due to the reſpondent, rather than any that may be due to the petitioners, the conſignees. In the *ſecond* place, he ſhall endeavour to ſhew, that Archibald Dunlop has been very improperly, and unfairly, endeavouring either to avoid altogether, or at leaſt to retard the payment of the reſpondent, and certain other creditors. And, in the *laſt* place, he ſhall ſhow, that as the petitioners have not produced any ſufficient evidence of the proper transference to them of this veſſel and cargo, ſo theſe remained the property of Dunlop, at the time of the reſpondent's arreſtments; and that, therefore, upon the clear principles of law, and of your Lordſhips deciſions, he muſt be preferred to the conſignees.

With regard to the *firſt*, it is to be obſerved, that in carrying on the trade of ſending goods from any part of Britain to merchants in Virginia, and getting remitted cargos of tobacco, &c. it is the uſual practice for the factor here to buy the goods at a great many months credit, in order that the merchants abroad may have time to diſpoſe of them, and remit their produce as nearly as may be, againſt the time the prices become due. Thus the price of theſe goods are uſually paid out of the proceeds of that cargo of tobacco, or other goods, which is their produce.

It appears, that the firſt cargo of goods ſent out by the petitioners to Archibald Dunlop, was in ſpring 1765; and as the cargo of tobacco now in queſtion was ſhipped in June and July 1765; ſo it is evident to every perſon who knows the leaſt of this trade, that it could not poſſibly be the produce of any of thoſe cargos of goods, ſent out by Meſſrs. Haſtie and Jamieſon.

Beſides, it appears from various writings in proceſs, that in July 1765, Archibald Dunlop had only received from Haſtie and Jamieſon two parcels of goods; one parcel by a ſhip called the Elliot, and another by a ſhip called the Peggy, amounting together in value to 647 l. 12 s. 3 d. half-penny, Sterling, ſo that, it will be remarked, the value of the veſſel and cargo now in queſtion, which is upwards of 3000 l. Sterling, greatly exceeded the value of the whole goods, which had been by that time ſent out. And farther, the time between the receipt of theſe goods by Archibald Dunlop, and the ſhipping the cargo now in queſtion, muſt have been ſo ſhort, that it was abſolutely impoſſible for him to have converted any part of them into tobacco. In the natural courſe of the Virginia trade, remittances for a cargo of goods ſent out in Spring 1765, could not poſſibly be expected ſooner than harveſt 1767, or perhaps even ſpring 1768.

In 1761 and 1762, James Dunlop, merchant in Glaſgow, the reſpondent's original debtor, ſent out large quantities of goods to Archibald Dunlop and his partner Ralſton. For theſe goods remittances have never yet been made, and for the debt due upon that account the reſpondent as creditor to James Dunlop, obtained a decreet of forthcoming againſt Dunlop and Ralſton, and thereupon arreſted the ſhip and cargo in queſtion. From conſidering therefore the nature of the Virginia trade, it appears much more natural to ſuppoſe, that this cargo is the remittance produced from the effects ſent out in 1761 and 1762, than that of the effects ſent out in 1765. As Dunlop and Ralſton in company, and Archibald Dunlop ſingly, have reſided conſtantly in the ſame quarter of the country, and have been in the courſe of dealing with the ſame ſet of cuſtomers, it is probable they would recover the produce of the effects 1761 and 1762 before that of the effects 1765; and yet your Lordſhips will perceive, that the veſſel and cargo now in queſtion were ſent home to pay the debts contracted by Archibald Dunlop in 1764 and 1765, while he allows all the debts previouſly contracted in 1761 and 1762 to remain unpaid: and therefore, upon the whole of this article your Lordſhips will perceive, that from the nature of this Virginia trade, and the practice of merchants

chants engaged in it, the cargo in queſtion is to be preſumed the produce of the goods ſent out from Scotland in 1761 and 1762, and ought to be applied towards the payment of the debts thereby contracted, rather than of debts contracted for goods ſent out in 1764 and 1765, of which it is impoſſible we can conceive the preſent cargo to be the produce.

In the *next* place, from a variety of letters and other writings produced in proceſs, it clearly appears, that Archibald Dunlop has been endeavouring either to evade altogether, or at leaſt to retard the payment of particular creditors. If he was gradually applying his money to the payment of all his creditors, in proportion as he had been enabled to do ſo by the ſucceſs of his trade; and if in this ſituation the whole was in danger of being ſnatched away by ſome ſingle creditor, there might at leaſt be ſome place for favour on the part of the conſignees. Where, however, on the contrary a merchant is making large remittances to certain favourite creditors, and is anxiouſly avoiding the payment of others whoſe claims are of longer ſtanding, every circumſtance of favour is ſurely on the ſide of theſe laſt.

There have been produced in proceſs a number of letters from Archibald Dunlop to the petitioners, partly wrote in the courſe of the year 1765, and partly in 1766. In a letter from Dunlop, dated in Virginia, 3d October 1765, after he had received intelligence of the reſpondent's having arreſted the ſhip and cargo in queſtion, he writes as follows: 'I have juſt now yours before me, *per* the Virginia and 'Mally, the contents I obſerve, which make me quite un-'eaſy to think of my ſhip being attached. At ſame time you 'may depend upon *my putting it out of their power in regard to 'the new ſhip*. At ſame time, I cannot think it is poſſible for 'them to attach the Betſy, until they had a judgement a-'gainſt us for the money.' In another part of the ſame letter he writes as follows. 'It is not poſſible for me to write 'you the uneaſineſs I am in at preſent in regard to *our old 'concern, for fear they ſhould proceed in the way they intend, as 'I expect they will if they can*: but would fain hope Mr,

'Ralſton

'Ralſton will be able to make them ſtay a little longer on 'us.' And in a third part of the ſame letter, after having informed them, that he intended ſoon to ſend home a new ſhip, with a valuable cargo of tobacco, he writes as follows. 'If you think proper, for the better ſecurity of my new 'ſhip and cargo, in caſe of their diſputing the right, I make 'here to you, *you better ſend out ſome writing for me to ſign in 'favour of you, and Haſtie to come home in the ſhip.* At ſame 'time they can, I think, make no diſpute where the invoice '*will ſhow it ſhip't on your account* On receipt of this you 'will adviſe me immediately, as I ſhall do every thing in 'my power to your deſire to prevent you trouble.'

The paper which Mr. Dunlop here mentions, and deſires the petitioners to ſend out, in order to prevent future attachments, was no other than an aſſignation of the ſhip and cargo, which he was afterwards to ſend home, and it appears to have been accordingly ſent; for in a letter from him, of date 27th March 1766, he writes of ſeveral ſhips and cargos which were ſoon to be ſent, and which he expreſsly ſays were to be the entire property of the petitioners. From theſe, and a variety of other letters in proceſs, Mr Dunlop's anxiety about what he calls his *old concern*, and his dread of his cargo's being attached upon that account, appears ſufficiently clear; his determined reſolution to avoid or delay the payment of the creditors upon this *old concern*, and the methods which he deviſed in order to elude their diligence, appear alſo very evident; and yet, your Lordſhips will obſerve, that while he is doing ſo, he is remitting large and valuable cargoes to his *new concern*, that is, to Meſſrs. Haſtie and Jamieſon.

The reſpondent might farther ſhew how much reaſon he has to ſuſpect the conduct of Mr. Dunlop, by many obſervations which he might offer upon the account of charge and diſcharge betwixt him and the petitioners, produced in proceſs. As, however, that would require an explanation of ſome length, and as it is not eſſential to the argument upon which this cauſe depends, he ſhall not trouble your Lordſhips with entering upon it at preſent, and hopes that what

what has been already ſaid will ſufficiently ſhow how little favour either Mr. Dunlop, or the petitioners his conſignees merit in the preſent queſtion.

In the laſt place, the reſpondent ſhall conſider the ſeveral different circumſtances upon which the purſuers would found their preference, and which they have firſt marſhal led out ſeparately, and have afterwards very artfully confounded all together in their argument. The reſpondent, however ſhall endeavour to ſatisfy your Lordſhips, that nei ther upon them taken ſeparately nor jointly together can the petitioners found any claim of preference to this veſſel and cargo.

The firſt circumſtance mentioned by the petitioners, and upon which they ſeem chiefly, if not entirely to reſt their argument, is the contract entered into in Auguſt, 1764, between them and Mr. Dunlop. By this contract they became bound to furniſh him with ſuch goods and merchandize from Glaſgow as he ſhould require; and on the other part, he became bound to remit to them at Glaſgow the value of ſuch goods in cargos of tobacco, &c. ſo as to diſcharge the prices of them as they fell due. The petitioners alledge, that in conſequence of this contract, and in return for goods ſent out by them, the veſſel and cargo in queſtion was ſent conſigned to them, and thereafter could not be affected either by Dunlop himſelf, or by any of his creditors.

How little this contract can avail the petitioners will beſt appear from conſidering the terms of it. It conſiſts of a number of clauſes, which it is unneceſſary to recite here, but the following is that upon which the petitioners alone can found.

'The ſaid Robert Haſtie and James Jamieſon have become 'bound and obliged, and hereby bind and oblige themſelves to ſend to, and furniſh the ſaid Archibald Dunlop 'at Cabine-point with goods and merchandize from Glaſgow, as near as poſſible to the ſchemes of goods, which the 'ſaid Archibald Dunlop ſhall ſend from Cabine-point to 'Glaſgow; *and that for the ſpace of years*, from and 'after the date hereof. For which goods, ſo to be ſent from 'Glaſgow, the ſaid Robert Haſtie and James Jamieſon are

'to be allowed commiſſion at the rate of 2½ *per cent.* and on 'the other hand, the ſaid Archibald Dunlop binds and ob- 'liges him and his ſucceſſors to remit to the ſaid Robert 'Haſtie and James Jamieſon at Glaſgow, the value of what- 'ever goods ſhall be ſhipped by them on his account, ac- 'cording as the ſaid value ſhall be aſcertained by the ſaid 'Robert Haſtie and James Jamieſon, their accompt-books 'without further proof, ſo as they may be enabled to 'pay the value of the ſaid goods to the ſellers or furniſhers 'thereof, and that from time to time as the ſame ſhall become 'due. And in caſe the ſaid Archibald Dunlop ſhall fail to 'make the foreſaid remittances timeouſly, ſo as to diſcharge 'the prices of the goods to be ſent out to him when the 'ſame fall due; then he binds and obliges himſelf and his 'foreſaids to pay to the ſaid Robert Haſtie and James Ja- 'mieſon, their heirs, executors or aſſignees, the lawful an- 'nual rent of the price of the ſaid goods, and that from the 'time the ſame ſhall become due to the furniſhers, until 'payment. Further, the ſaid Archibald Dunlop binds and 'obliges himſelf and his foreſaids, that whatever tobacco 'he ſhall ſhip for Clyde, from this date, during 'the foreſaid ſpace of years, ſhall be con- 'ſigned by him to the ſaid Robert Haſtie and James Jamieſon 'for ſale, and which they hereby oblige themſelves to diſ- 'poſe of to the beſt advantage. For which, by expreſs a- 'greement, they are to be allowed commiſſion, at the rate 'of twelve ſhillings and ſixpence ſterling, for each hogſhead 'of tobacco, clear of all charges.'

From this clauſe it it apprehended to be plain, that the petitioners and Mr. Dunlop were thereby eſtabliſhed the factors and correſpondents of each other in Virginia and Scotland. It is a perſonal obligation upon them to ſend him out ſuch goods as he ſhould think fit for his market, and upon him to remit them the value, and to conſign to them what tobaccos he ſhould ſhip for Clyde to be diſpoſed of, and accounted for to him, after being allowed a commiſſion of 12 s. 6 d. per hogſhead. This however, can never be underſtood an abſolute conveyance, or appropriation of all, or any

any of the veſſels or goods which ſhould be afterwards ſent from the one to the other. Dunlop could not convey to them the property of tobacco which had not yet grown, nor could he by any ſuch contract withdraw from his other creditors all the effects which he either then had, or might afterwards have.

Beſides this contract is ſtill blank as to the years of its endurance, and conſequently might be conſidered as expired at the period in queſtion. If we ſhould ſuppoſe it to be ſtill ſubſiſting, and that it inferred an abſolute conveyance of all the cargos to be ſent, it would be a contract of the moſt unlawful and fraudulent nature, and if ſuch were the caſe, Dunlop might elude the payment of the reſpondent and other creditors upon the *old concern* for ever.

But there is another clauſe of this contract, which makes it perfectly clear, that the properties of cargos to be afterwards ſent, were not thereby transferred to the petitioners. By this clauſe it is provided, that they ſhall, on no account, *be liable for any bad debts that ſhall be made in ſales of tobacco, or any other goods or commodities to be conſigned to them by* the ſaid Archibald Dunlop, further than they ſhall make no ſales except to ſuch perſons as are deemed ſufficient for the time." This condition your Lordſhips perceive was altogether inconſiſtent with the petitioners holding the property of the goods they diſpoſed of as purchaſers; but was entirely conſiſtent with their being properly the factors and agents of Mr. Dunlop, in diſpoſing of goods which ſtill continued to be his property.

It is apprehended therefore to be plain, that this contract is no more than a perſonal obligation, and cannot import any transferrence of the property of any cargo to be afterwards ſent. The petitioners, however, in the next place found upon the conſignation in conſequence of this contract, as a ſufficient transferrence to them of the cargo; and therefore the next circumſtance they found upon is Dunlop's letters of advice, and the inſtructions given to Conkie the ſhipmaſter, to deliver the veſſel and cargo to the petitioners.

Theſe inſtructions and letters however, plainly indicate

cate the intention of Mr. Dunlop, that this veſſel and cargo ſhould be delivered to the petitioners by his ſhipmaſter Conkie, which cannot be diſputed; yet they only prove the intention, and by no means that, in conſequence of it, the delivery was actually made, and the property accordingly transferred.

The petitioners, in the next place, found upon the bill of loading, and the ſeparate inſtructions given by Dunlop to Conkie, enjoining him, upon his arrival at Port-Glaſgow, to ſend an expreſs to the petitioners and receive their directions.

With regard to the *firſt*, the bill of loading, it expreſsly bears, 'that the cargo is ſhipt *on account and riſk* of Archi-'bald Dunlop, being marked and numbered as on the 'margin; and are to be delivered in the like good order 'and well conditioned at the Port of Port-Glaſgow (the dan-'ger of the ſeas only excepted) unto Meſſrs Robert Haſtie 'and James Jamieſon, merchants in Glaſgow, or their aſſigns, 'he or they paying freight for the ſaid goods, &c.' The invoice, in like manner bears, the goods to be ſhipped by Archibald Dunlop on board the Betſey, David Conkie maſter, *on account and riſk of the ſhipper*.

As theſe expreſsly bear, that the ſhip and cargo continued upon the riſk, and remained the property of Archibald Dunlop, till they ſhould be delivered into the poſſeſſion of the conſignees, it is humbly apprehended they can in no degree aid the argument of the petitioners. And the private inſtructions which the petitioners mention, after directing Conkie how to act if the ſhip ſhould be ſold, and how to conduct himſelf in caſe he brought her back to Virginia, conclude with the following words, which clearly ſhow, that till the actual delivery to them, and a ſale by them, Dunlop conſidered himſelf to continue proprietor of the veſſel and cargo. His 'words are, and I muſt ſtrongly recommend to you your care 'on the veſſel, and your being as moderate as you can 'in your outfits. You'll pleaſe conſider *I have every thing to* '*bear myſelf*.'

The petitioners have, in the next place, attempted to found

found upon the insurance of both ship and cargo having been made in their name.

This circumstance, however, though supposed true, is of no manner of consequence; for your Lordships will observe, that by a clause in the contract 1764, it is expressly a- 'greed, 'that what goods shall be shipt from Clyde to the 'said Archibald Dunlop, shall be ensured at Glalgow by 'the said Robert Hastie and James Jamieson; and that they 'shall also procure insurance at Glasgow upon what tobacco 'and other goods shall be consigned to them by the said 'Archibald Dunlop, and that with all convenient speed, 'after they shall receive his orders to that effect,'

From hence it is plain, that, in getting the insurance upon this vessel, the petitioners were merely acting as factors for Dunlop and were by no means considering themselves as proprietors of the ship and cargo. This appears still farther from his letters to them produced in process in which, with regard to this very ship and cargo, he writes in a letter dated 25th May, and 1st June 1765, 'You'll make 'insurance *for me*, I don't chuse *to run any risk* And a- 'gain, You'll make insurance on *my account*: In another 'letter, 7th July 1765, he writes again 'You'll make insu- 'rance *for me*,' —— 'don't chuse to *run any risk*;' and in short all his letters are in the very same strain.

It has been proved beyond a doubt, that the insurance was made by the petitioners upon account of Dunlop alone, although the policy had been taken out by them simply in their own names. Nothing indeed is more common than for factors to get insurances made in this manner; but if a loss should happen, they are obliged not only to declare, but even to instruct, the names and interests of their constituents, as your Lordships know, express Statute has prohibited any persons to take insurances on ships or cargos beyond their real interest therein. But farther, it is not true that the insurance is in name of the petitioners, as proprietors, for the words of the policy are, 'for account of themselves 'or any others that are, or may be concerned:' And the reason of their taking it in this way was, that they were

adviſed there were other tobaccos conſigned to them by this ſhip, beſides that conſigned by Archibald Dunlop.

The laſt circumſtance upon which the petitioners found, is an attempt which they make to ſhow, that they actually took poſſeſſion of the veſſel and cargo, after its arrival in the river Clyde. This circumſtance, as ſtated in the petition, is, that one of the petitioners, *upon notice of the veſſel's having put into one of the out-ports, went on board and gave directions to the captain to proceed with the ſhip to Port-Glaſgow.* This is altogether a miſrepreſentation, of the fact, which when ſtated as it truely happened, will appear of very little conſequence. Mr. Haſtie, one of the petitioners, happened then to be valetudinary and was lodged on the north-ſide of the river Clyde oppoſite to Greenock for the benefit of the ſea-water. As he was a mercantile man, it was his only amuſement to go out in a little boat to almoſt every ſhip which he ſaw coming up the river, and there to pick up mercantile news from America and the Weſt-Indies. Among other ſhips he went aboard the one in queſtion; which was in no out-port, but in the river Clyde near Denune. 'Till he had gone aboard, he neither knew her name, nor any thing about her, and in an hour after he left her, and returned to his lodgings. Conkie afterwards proceeded with the veſſel to Port-Glaſgow in conſequence of his directions from Archibald Dunlop, and then diſpatched his letters of advice by expreſs to the conſignees at Glaſgow, before which time the reſpondent had arreſted both ſhip and cargo. He humbly apprehends that it would be perfectly improper to conſume your Lordſhips time upon a circumſtance ſo extremely immaterial.

The reſpondent humbly apprehends, that after having thus examined the contract 1764, the bill of loading, invoice, inſtructions, policy of inſurance, and all Dunlop's letters produced in proceſs, he has ſatisfied your Lordſhips that this ſhip and cargo remained, and were to remain, the property and upon the riſk of Archibald Dunlop, at leaſt, 'till they ſhould be delivered into the poſſeſſion of the petitioners, the conſignees. And to compleat the evidence upon this ſubject

ject, your Lordſhips will attend to the oath of Conkie the ſhipmaſter, above-recited, by which it is eſtabliſhed, that at the date of the reſpondent's arreſtment, this ſhip and cargo remained in his poſſeſſion as the property of Dunlop.

As therefore the petitioners have not been able to produce any evidence to ſhow, that the property of this veſſel and cargo was transferred to them, they, in the next place contend, that as by the contract 1764, Dunlop was bound to remit to them all cargoes of tobacco which he ſhould ſhip for Clyde, ſo the after conſignment of any cargo deſtined for them, gave them ſuch a *jus quæſitum* in it, as would exclude not only the diligence of other creditors, but likewiſe the altering the deſtination by Dunlop himſelf.

On the other hand, however, the reſpondent humbly apprehends nothing to be more clearly eſtabliſhed; than that in order to transfer the property of moveables, actual delivery is abſolutely neceſſary.

If the property therefore had remained in Dunlop's own poſſeſſion, it cannot admit of a doubt that whatever intention he might have formed with regard to the diſpoſal of it, or in whatever manner he might become bound to diſpoſe of it, ſtill, until in conſequence of that intention or obligation, he had actually delivered and thereby transferred his property, he had full power to alter his intention, and diſpoſe of it in any other manner he pleaſed.

The only difficulty then ariſes from this ſhip and cargo not being in the actual poſſeſſion of Dunlop, but in the poſſeſſion of David Conkie his ſhipmaſter. But then it is clear, that Conkie was not the ſervant or perſon named by the petitioners, the conſignees. He was the officer hired by Dunlop to navigate his veſſel, and to deliver his own goods to his conſignees, and the reſt of the cargo, which was double his quantity, to the other proprietors, or their conſignees. And it is a principle clearly eſtabliſhed, that money or goods put into the hands of my ſervant, or of a third party, to be delivered to another, does by no means carry away from me the property, till it is actually ſo delivered. If before ſuch delivery, they periſh, they are loſt to the debtor,

or, not to the creditor: And the petitioners acknowledge that in this very caſe, if the veſſel or cargo had periſhed while in the poſſeſſion of Conkie, it would have been loſt to Dunlop, not to them. This is a plain admiſſion, that the property remained with Dunlop; and yet they would contend, that he has not a power of recalling the deſtination of that property; or that like any other part of his property, it might be attached by the legal diligence of his creditors.

In ſhort, nothing can be more inconſiſtent or abſurd, than the whole reaſoning of the petitioners: for they would make it half his property, and half not his property, as it might ſuit their own intereſt. If the cargo had periſhed, they would allow it to be his property; becauſe otherwiſe the loſs would fall upon themſelves. As the cargo exiſts, they would have it not his property, but their own; becauſe otherwiſe the reſpondent muſt be preferred in virtue of his arreſtment.

In order to relieve themſelves of this difficulty, they inſiſt upon its being a conſignation in conſequence of a prior onerous contract. This, however, can as little avail them. A diſpoſition in conſequence of a prior onerous obligation, may be diſappointed by a poſterior diſpoſition, if the laſt diſponee ſhall firſt attain poſſeſſion. An aſſignation in conſequence of a prior obligation may be diſappointed by a poſterior aſſignation, if the laſt aſſignation ſhall be firſt compleated by intimation. A conſignment, the reſpondent muſt humbly beg leave to conſider in the ſame light, and to maintain, that if, before delivery, the deſtination was either altered, or prevented from taking effect by the legal diligence of a creditor, the claim of the conſignees is at an end. And that Mr. Dunlop himſelf conſidered this conſignment in the ſame light, is clear from theſe paſſages in his letters above recited, in which he ſays, that with regard to future cargos, he would put it out of the power of his creditors to attach them.

The petitioners have, in the next place, alledged, that Dunlop himſelf after the conſignment, and even before delivery, could not recal his deſtination. And they talk of the conſignment's having been *neceſſitatis*, and not *voluntatis*, and of their having a *jus quæſitum*. The reſpondent does not

appre-

apprehend there is any charm in theſe Latin words, but the petitioners ſeem to be at a loſs for any principles to ſupport them, which they can explain.

Money in the hands of a ſervant, or of a third party, it has been ſhewn, remains the property of the perſon who gave it, till it is actually delivered, in conſequence of his orders. While it remains the property of the mandant, the mandate may be revocked. If indeed matters are no longer entire, that is to ſay, if either the money is delivered to the creditor, or if the truſtee has come under an obligation to the creditor to pay it, then the mandate is no longer revocable, and the ſubject is no longer affectable by the mandant's creditors. Accordingly your Lordſhips have uniformly found, in all caſes where matters remained entire, that the mandate was ſubject to revocation, and that the goods or money remained the property of the mandant, and as ſuch arreſtable by his creditors. So, in two caſes mentioned in the dictionary *voce jus quæſitum tertio*, vol. I. p. 512. 'The creditor in a bill having given orders to his 'truſtee, to whom it was indorſed, to pay a part of the mo-'ney to a third party, his creditor: The Lords, notwith-'ſtanding the order, found the property of the money re-'mained with him who ſent the advice, and therefore might 'be arreſted by his creditors. Dalrymple Forbes, 16th 'January 1706. Lord Roſs and Gray. Fountainhall, 21ſt 'July 1697. Inglis and Clark.' In the very ſame manner, your Lordſhips decided in two caſes, collected by Lord Kaims, in his collection of remarkable deciſions from 1730 to 1732; the firſt is a caſe, November 1732, creditors of Auchterlony competing; and the other, 4th January 1744, Sir John Baird againſt creditors of Mr. Hugh Murray. In particular the caſe laſt mentioned deſerves particular attention, as there the equitable intereſt of the creditor, for whoſe payment the money was deſtined, was infinitely ſtronger in every circumſtance than in the preſent caſe, and yet your Lordſhips preferred the other creditors.

The petitioners, in the laſt place, have endeavoured to reſemble their caſe to that of the competition of the credi-

tors of M'Farlane, decided by your Lordſhips in December 1766. The Reſpondent however humbly apprehends, that deciſion can by no means apply to the preſent caſe.

In that caſe, M'Farlane the debtor ſent to this country a cargo for the ſole purpoſe of paying his different creditors. He conſigned it not to his uſual agent, but to a merchant with whom he never before had any connections. He wrote to each of the different creditors, acquainting them of his having ſent that cargo for their payment, and deſiring them accordingly to apply to the conſignee to whom it was ſent for their behoof. In his letter to the conſignee, he gave a liſt of the different creditors, and mentioned the preciſe ſum which was to be paid to each. As ſoon as the veſſel and cargo arrived, and was received by the conſignee at Port-Glaſgow; he wrote to the different creditors, informing them of his having received that cargo for their payment, and promiſing to pay them accordingly, as ſoon as in caſh. When the competition occurred in that caſe, your Lordſhips conſidered the conſignee not as the truſtee of the debtor, but as the truſtee of the creditors; and when he had received the cargo, it was conſidered to be the ſame thing as if the creditors themſelves had received it. Beſides, after the conſignee had wrote letters to the creditors, obliging himſelf to pay them as ſoon as in caſh: matters were no longer entire; and it was not till after this had happened, that the arreſtments were uſed in the hands of the conſignee. Accordingly the Lord Ordinary pronounced a judgement in theſe terms, 'Finds the goods conſigned with 'King (*i. e.*) the conſignee for behoof of the creditors ſpeci-'fied in the letter, and to whom he notified the ſaid conſig-'nation it could not be habilely arreſted, &c." This judgement was adhered to by three conſecutive interlocutors of your Lordſhips.

Your Lordſhips will thus perceive, that this deciſion proceeded upon two different foundations altogether unapplicable to the preſent caſe. He ſhall only further obſerve, that in that caſe M'Farlane was honeſtly applying his money gradually to the payment of his creditors, in proportion as he had become

become enabled to do ſo by ſucceſs of his trade. In the preſent caſe however, you perceive a debtor anxiouſly avoiding the payment of creditors of long ſtanding, and making ſo large a conſignment as this to the petitioners, three times more extenſive than any debts he owed them, and therefore rather to be conſidered, as ſent for himſelf, for whom they were only factors.

Upon the whole, the reſpondent humbly hopes, your Lordſhips will have no difficulty in adhering to the interlocutors of the Lord Ordinary. He is ſorry that theſe anſwers have drawn out to ſo great a length; but the ſum in controverſy is of large extent, and as it is a queſtion of great conſequence to him, he hopes your Lordſhips will pardon his anxiety.

In reſpect whereof, &c.

ROBERT CULLEN.

Ex. Gm. B.
3/17/02